In the High Court of Punjab and Haryana at Chandigarh.

F.A.O.No.2203 of 2003.

Date of decision:

Yahspal Malhotra and another.

...Appellants.

Versus

Rubal Malhotra @ Akash and another.

...Respondent.

...

Coram: Hon'ble Mr. Justice S. N.Aggarwal.

...

Present: Mr.Sukant Gupta Advocate for the appellants.

Mr.G.S.Jaswal Advocate for the respondent.

...

Judgment.

S. N. Aggarwal, J.

Yashpal Malhotra appellant was married earlier with another lady. He had one son namely Ashok Malhotra appellant and two daughters. His wife had expired. Thereafter, he contracted a second marriage with Kamal Malhotra and out of her womb, a son namely Rubal Malhotra alias Akash (respondent No.1) was born. The appellant suffered a decree in favour of his son Rubal Malhotra on 3.8.1993 passed by Shri R.K.Sondhi, then Sub Judge, Ambala by which the first floor of house No.348, Sector 7,Urban Estate, Ambala city was

transferred in his favour.

The relations between Yashpal Malhotra and his second wife Kamal Malhotra did not proceed smoothly and they started living separately. In these circumstances, Rubal Malhotra respondent No.1 filed a petition under the Guardians and Ward Act,1890 (in short GAW Act of 1890) read with Hindu Minority and Guardianship Act for cancelling guardianship of his father Yashpal Malhotra appellant over him and his property and entrusting the same to his mother Kamal Malhotra. It was also prayed by respondent No.1 that his father Yashpal Malhotra be required to deposit the rent of the property in the name of the minor in the Bank account of the minor.

The said petition was contested by the appellant-father. He even denied his paternity of the minor child and also took the plea that he has filed a civil suit for the cancellation of the collusive decree suffered by him in favour of Rubal Malhotra, respondent No.1. It was also contested on all other aspects.

The learned trial Court accepted the petition filed by the minor child vide judgment dated 13.2.2003, the guardianship of the appellant was cancelled and the minor child was placed under the guardianship of his mother. The appellant was directed to furnish the accounts in respect of the portion of the house owned by the minor child from the date of decree in favour of the minor child and to deposit the entire rental income into the account of the minor child within a period of two months.

Hence, the present appeal by the father and his son from the first wife.

The submission of learned counsel for the appellants was that even the application under the GAW Act read with Hindu Minority and Guardianship Act was not maintainable. It was submitted that the appellant has filed a civil suit for cancellation of collusive decree in favour of the minor child and,therefore, till the civil suit is decided, no relief can be granted to the minor child as these are competing claims over the property in dispute. Reference was made to the judgment of this Court reported as **Daman Singh,Prabhu Dayal v.Mt.Maktul Kaur,**AIR 1955 Punjab 137.

This submission has been considered. It has no merits. **Daman Singh's** judgment was on different set of facts. In the reported case, Daman Singh had pleaded that his son Kuldip Singh minor was adopted by Maktul Kaur. Daman Singh had pleaded that the property in possession of Maktul Kaur belonged to Kuldip Singh minor and,therefore, he got appointed a Local Commissioner for taking out the moveable property from the custody of Maktul Kaur while Maktul Kaur had claimed the said movable property as belonging to her. It was, in these circumstances, that this Court had held that since there were competing claims over the property,therefore, no such order would have been passed under the GAW Act for taking away the property by alleging the same to be of the minor.

But, in the present case, by a Court decree, regarding the

first floor of property of house No.348,Sector 7,Urban Estate, Ambala City, the minor child namely Rubal Malhotra has been declared to be the owner. It may be that the appellant has filed a civil suit for the cancellation of that decree but till that suit is decreed in favour of Yashpal appellant,the judgment and decree still stands in favour of the minor child by which he was declared to the owner of that property. Therefore, the minor child is entitled to seek accounts of that property as he continues to be the owner of the said property from the the date decree dated 3.8.1992 was passed in his favour till the said decree is set aside.

Therefore, the judgment relied upon by the appellant does not apply to the facts of this case. There is nothing wrong in the impugned order dated 13.2.2003 passed by the learned trial Court by which the appellant has been directed to render the accounts of that portion of the property which is owned by the minor child but possessed by the appellant either personally or through the tenant.The said property was in possession of Yashpal Malhotra,appellant. Although at the time of arguments, it was submitted by the learned counsel for the appellants that the first floor of the house was lying vacant, but his case in the trial Court was that he was earning rent at the rate of Rs.1,600/- and not Rs.2,000/- per month as claimed by the minor child.

The next submission of the learned counsel for the appellants was that while filing the application under the GAW Act

read with the provisions of Hindu Minority and Guardianship Act,the provisions of Section 10(3) of the GAW Act of 1890 were not complied with. It was submitted that the petition was required to be signed by him and attested by two witnesses but that was not done. He relied upon the judgment of the Hon'ble Division Bench of Calcutta High Court reported as **Rabindra Nath Mukherjee v.Abinash Chandra Chatterjee,** AIR 1972 Calcutta 143 and submitted that the said petition was liable to be dismissed.

This submission has been considered. It deserves notice that sub section (1) of Section 10 of the GAW Act of 1890 deals with the petition filed by individuals for the custody of the minor child. Sub section (2) of Section 10 of GAW Act of 1890 deals with the application filed by the Collector. Different words have been used in sub section (1) and sub section (2). In sub-section (1), the persons seeking the custody has to file a **petition** while the Collector has to file an **application** under sub section (2) of Section 10 of GAW Act of 1890. This distinction is also clear from the wording of sub section (1) of Section 10 of GAW Act of 1890. Sub section (3) deals with the **application** and not with the **petition**. It means, therefore, that sub section (3) of Section 10 is applicable only to the **applications** filed by the Collector and not to the **petitions** filed by individuals for seeking custody of the minor child.

It has been laid down by the Hon'ble Supreme Court in a number of judgments that if different words have been used in the same

enactment, the legislative intent is to assign different meanings to different words. If there had been no such intention then the same words would have been used by the Legislature. Reference may be made to the judgment of the Hon'ble Supreme Court reported as **Kailash Nath Agrawal and others Versus Pradeshiya Industrial & Investment Corporation of U.P. Ltd. and another,** (2003) 4 Supreme Court Cases 305.

In the present case, two words have been used i.e. the Collector has to file an **application** while an individual has to file a **petition** for custody of minor child. Sub section (3) of Section 10 of GAW Act the violation of which is alleged by the learned counsel for the appellants only deals with the **applications** and not with the **petitions.** In the present case, it is the mother who has filed the **petition** under sub section (1) and not the Collector. Therefore, sub section (3) of Section 10 of GAW Act of 1890 does not apply to the facts of the present case.

There is another distinguishing feature between sub sections (1) and (2). Under sub section (1), the individual petitioner has to sign the petition and verify the same in the same manner as is prescribed in the Code of Civil Procedure for signing and verifying the plaint. It is also necessary for him to narrate the facts from (a) to (l) as laid down in sub section (1). However, the Collector in the application filed under sub section (2) has to give the information as specified in sub section (1) as far as possible. It means,therefore, the Collector is

not bound to give the information as stated in sub Section 1(a) to 1(l) of Section 10 which is mandatory for the individual petitioner filing a petition under sub section (1) of section 10 of GAW Act of 1890. It means,therefore, that situation is entirely different in the individual filing a petition under sub section (1) and the Collector filing application under sub section (2) of Section 10.

The language of sub section (3) also reveals that it deals only with sub section (2). It lays down that the application to be filed by the Collector under sub section (2) must be accompanied by a declaration of the willingness of the **proposed guardian**. In the petition filed by the individual, custody of the minor child is claimed by the petitioner and,therefore, the question of attaching a declaration of willingness of the **proposed guardian** did not arise because he himself is the **proposed guardian.**

Otherwise also, it looks very strange that the mother of the minor child filing a petition for the custody of her minor child needs the attestation of two witnesses. Such an interpretation if given to the words used in sub section (3) of Section 10 would not only lead to absurdity but it would also defeat the ends of justice. No procedure can be clothed with such interpretation which leads to mis-carriage of justice.

The facts of the present case are still different because in the present case, the petition has been filed by the minor child not even by the mother of the minor child. No doubt the minor child has filed

this petition through his mother, the relief is sought by the minor child and not by the mother. The mother has sued as a guardian of the minor child who is claiming his rights for his best welfare. Therefore, the provisions of sub section (3) of Section 10 of GAW Act, 1890 did not apply to the facts of the present case. The judgment relied upon by the learned counsel for the appellants cannot be applied to the facts of the present case.

The next submission of the learned counsel for the appellants was that in the interim order dated 22.3.1999, the learned Guardian Judge had rejected the application for interim relief for the same purpose while relief has been granted by the Guardian Judge in the final judgment dated 13.2.2003. Hence,it was submitted that the learned Guardian Judge has no right to record different sets of findings at two different stages of the same proceedings.

This submission has been considered. It has no merits at all. Interim order was passed by the learned Guardian Judge to dispose of an application seeking interim relief. That order is passed by the Court without taking into consideration the evidence led by the parties . Moreover, the interim orders are meant only to dispose of interim applications. These orders do not determine the rights of the parties. The passing of the interim order,therefore, does not debar the learned trial Court from taking different view at the time of final judgment because the final judgment is based on the evidence led by the parties.

By the impugned judgment dated 13.2.2003, the claim of

the minor child for changing his custody from his father has been accepted and the minor child has been placed in the custody of his mother. Obviously, the interest of the minor child is not safe in the hands of the appellant. The appellant has not only challenged the paternity of the minor child but he has also challenged the decree dated 3.8.1992 passed in favour of the minor child by which he has been declared owner of first floor of house No.348, Sector 7,Urban Estate, Ambala City. It means, therefore, that the appellant is not working in the interest of the minor child, rather holds adverse interest.

Admittedly, the property of which the minor child is the owner is in custody of the appellant and the learned trial Court has granted relief to the minor child for seeking accounts from his father i.e. the appellant regarding the income of that portion which the appellant has secured by renting out the same to the tenant.

In view of the discussion held above, I find no infirmity in the impugned order passed by the learned trial Court.

There is no merit in the present appeal and the same is dismissed.

November ,2006. (S. N. Aggarwal)
Jaggi Judge